WILLIAM TEO'S HOUSE AND ESTATE AGENCIES v. CHAN ENG SWEE

[O.C.J. (Hepworth J.) February 22, 1965]

[Penang — Civil Suit No. 400 of 1962]

Contract — Debt — Agreement to pay lesser sum in settlement — Whether agreement available as a defence — Estoppel.

The plaintiff claimed the sum of $3,592 from the defendant arising from transactions relating to the letting of premises. The defendant alleged that there was a general settlement of all outstanding claims between him and the plaintiff under which he had agreed to pay and had paid the sum of $2,000. The plaintiff agreed that he had received the sum of $2,000 but denied that it was an overall settlement and he in support of his contention pleaded that since that settlement he had obtained judgment by default against the defendant in the sum of $2,256.96 and had been paid this sum.

Held: (1) on the facts there was an agreement for the payment of $2,000 by the defendant to the plaintiff in settlement of all outstanding claims between them;

(2) the defendant can rely on this agreement as a defence to the claim;

(3) the defendant was not estopped from setting up the defence, despite the fact that he did not avail himself of it in the earlier action.

Cases referred to:—

(1) *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] 1 K.B. 130.

(2) *Combe* v. *Combe* [1951] 2 K.B. 215.

(3) *New Brunswick Rly. Co.* v. *British & French Trust Corpn. Ltd.* [1939] A.C. 1 at p. 21.

(4) *Howlett* v. *Tarte* 142 E.R. 673 at p. 679.

CIVIL SUIT.

Jag-Jit Singh for the plaintiffs.

Geh Cheng Lok for the defendant.

Cur. Adv. Vult.

Hepworth J.: The plaintiffs and the defendant are house and estate agents carrying on business at No. 33-C, Beach Street, Penang, and No. 6-C, Tanjong Tokong Road, Penang, respectively. Although the plaintiffs are suing as a firm I have referred in this judgment to the plaintiff as if the plaintiff was Teo Choon Teck (P.W.1).

The plaintiff and the defendant had business dealings together commencing in 1959, involving the letting and subletting of houses. In general the terms of the agreement between them were that the plaintiff would sublet certain houses, of which the plaintiff was the tenant, to the defendant with a view to the defendant in turn finding tenants to whom to sublet the premises. If the defendant succeeded in letting the premises to a tenant at a rent in excess of the rent he was charged by the plaintiff then, after the deduction of certain amounts, for example payments in respect of the monthly rental of electric fans, such excess would be divided equally between the plaintiff and the defendant. It is unnecessary to go into the precise details of this agreement. Suffice it to say that the plaintiff claims that by July, 1961, as a result of these business dealings, the defendant was indebted to the plaintiff in the sum of $3,592.20.

After a somewhat tempestuous journey the pleadings sailed into less troubled waters and in the ensuing calm the issues have become comparatively straightforward. The defendant's defence to the plaintiff's claim emerges as a plea that in the latter part of 1961 there was a general settlement of all outstanding claims between the plaintiff and the defendant. The defendant pleads that the plaintiff brought an action against him, Penang Sessions Court Civil Action No. 94 of 1961, in which the defendant filed a defence and a counterclaim. He goes on to say that subsequently there was a general get-together between himself, the plaintiff and a mutual friend of theirs, one Mr. D. Jesudason, who acted as a mediator for them both. The defendant pleads that as a result the plaintiff agreed to relinquish all claims which he then had against the defendant on the terms that:—

(a) the defendant was to pay to the plaintiff the sum of $2,000 by four equal monthly instalments of $500 each;

(b) Mr. D. Jesudason was to ensure that the arrangement arrived at in (a) above was complied with;

(c) the defendant was to withdraw his counterclaim in Penang Sessions Court Civil Action No. 94 of 1961;

(d) the plaintiff was to withdraw his claim in Penang Sessions Court Civil Action No. 94 of 1961; and

(e) the plaintiff and the defendant were to relinquish all claims and/or counterclaims which they might have against each other.

The defendant pleads that in compliance with this agreement he withdrew his counterclaim in Penang Sessions Court Civil Action No. 94 of 1961, and the plaintiff filed a notice of discontinuance. Subsequently the defendant paid to the plaintiff through Mr. D. Jesudason four monthly instalments totalling $2,000 and the plaintiff accepted the sum in full settlement and discharge of all or any claims which he then had against the defendant.

The defendant pleads that relying on the doctrine of accord and satisfaction the sum claimed by the plaintiff is not due from the defendant.

In his reply the plaintiff states that he agreed to accept this sum of $2,000 in settlement, firstly of the amount claimed in Penang Sessions Court Civil Action No. 94 of 1961 amounting to $1,678.70, and secondly of an amount of $689.35 due to him from the defendant on two cheques for the sums of $310 and $379.35 respectively, which together total $2,368.05. This sum was paid in the manner already referred to, but the

plaintiff denies that this was an overall settlement of all claims against the defendant.

In support of this contention the plaintiff pleads that after the settlement of the Penang Sessions Court Civil Action No. 94 of 1961 in October, 1961, he issued a writ and successfully obtained judgment against the defendant in Penang High Court Civil Suit No. 116 of 1962 for a sum of $2,256.96 and the defendant satisfied the said judgment debt in full. The plaintiff pleads that in consequence of what happened in this civil suit the defendant is estopped by record and conduct from pleading accord and satisfaction.

Mr. D. Jesudason is a school-master and was called as a witness by the defendant. Mr. Jesudason first met the plaintiff and the defendant in August 1961, when he was posted to Penang and the plaintiff and the defendant were instrumental in finding him accommodation. As a result he got to know them both. On learning from both the plaintiff and the defendant that differences had arisen between them he endeavoured to settle the differences between them. In the end as the result of a meeting at a dinner given by Mr. Jesudason at the Sun Hoe Peng Restaurant, Penang, specifically for the purpose a general settlement of all claims was agreed upon. Mr. Jesudason said that when first asked what sum he would accept in full settlement of all claims the plaintiff mentioned a figure of $4,000. The total sum due to the plaintiff at that time, Mr. Jesudason thought, was very roughly somewhere between $4,000 and $6,000, but there was the defendant's counterclaim to be taken into consideration. Ultimately after considerable negotiations the plaintiff agreed to accept $2,000.

As against Mr. Jesudason's evidence there is the incontrovertible fact that the plaintiff subsequently obtained judgment against the defendant in Penang High Court Civil Suit No. 116 of 1962 for the sum of $2,256.96 which the defendant satisfied in full. But it is to be noted that this judgment was a judgment in default of defence. Nevertheless I formed the view that the defendant is not the sort of person who, in the ordinary course of events, would be expected to allow judgment to be obtained against him in default of defence if he had an arguable defence to the action, as it is clear from the defence in this case that he had.

I find myself in considerable difficulty over this point firstly because I can see no reason why Mr. Jesudason, who was in my opinion a completely unbiased mediator, should say the settlement arrived at the Sun Hoe Peng Restaurant was an overall settlement of all claims if in fact it was not, and secondly because on seeing and hearing Mr. Jesudason in the witness box I believe that he was telling the truth. The only conclusion that I can arrive at in the circumstances with regard to the judgment in Penang High Court Civil Suit No. 116 of 1962 and the satisfaction of that judgment by the defendant is that in connection with that action the defendant was badly advised. Accordingly I find as a fact that the agreement between the plaintiff and the defendant for the payment of $2,000 by the defendant to the plaintiff was in settlement of all outstanding claims between them.

This leaves the following questions to be answered:—

(1) Does this agreement *prima facie* afford the defendant a defence to this action?

(2) If it does, is the defendant estopped from pleading it?

After a breach of contract has taken place the cause of action that arises from the breach may be discharged by accord and satisfaction, that is to say, by an agreement between the parties providing for the acceptance by the promisee of something else than the remedy to which he is entitled by law, coupled with performance of the consideration agreed upon. Such an agreement need not be in writing. Where the amount due is uncertain or disputed, payment of any sum agreed between the parties is a satisfaction of the liability; but where a liquidated amount is due, payment of a smaller amount cannot be relied on as a satisfaction unless there is consideration for the relinquishment of the balance, or the circumstances are such that the creditor cannot take advantage of the absence of consideration. (*Halsbury's* Laws of England, 3rd Edition, Volume 8, at page 206).

In the present case the settlement arrived at was not only a settlement of the claim in Penang Sessions Court Civil Action No. 94 of 1961 but the settlement of a number of other claims as well. I do not think it is necessary for me to consider whether there was consideration for the relinquishment of the balance, because even if there was no consideration its absence in my opinion is not fatal to the defendant's plea for the following reasons.

In the case of *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[1] it was held that where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even although the promise may not be supported by consideration in the strict sense and the effect of the arrangement made is to vary the terms of a contract under seal by one of

less value. In the case of *Combe* v. *Combe* [2] Denning L.J. explained the decision in the *High Trees case* as follows:—

"Much as I am inclined to favour the principle stated in the *High Trees case*, it is important that it should not be stretched too far, lest it should be endangered. That principle does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties. That is the way it was put in *Hughes* v. *Metropolitan Railway*, the case in the House of Lords in which the principle was first stated and in *Birmingham, etc., Land Company* v. *London and North-Western Railway Co.*, the case in the Court of Appeal where the principle was enlarged. It is also implicit in all the modern cases in which the principle has been developed. Sometimes it is a plaintiff who is not allowed to insist on his strict legal rights.... On other occasions it is a defendant who is not allowed to insist on his strict legal rights. .....

The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration but only by his word."

In the same case Asquith L.J., at page 225, referring to the *High Trees case* stated:—

"What that case decides is that when a promise is given which (1) is intended to create legal relations, (2) is intended to be acted upon by the promisee, and (3) is in fact so acted upon, the promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it. It does not, as I read it, decide that a promisee can sue on the promise. On the contrary, Denning J. expressly stated the contrary."

As Birkett L.J. said in the same case the doctrine is "one to be used as a shield and not as a sword."

The answer to the first question is therefore that the agreement does *prima facie* afford the defendant a defence to this action.

The plaintiff in his reply is saying that a party cannot in a subsequent proceeding raise a ground of defence which upon the pleadings or the form of the issue was open to him in the former one, and a defendant to a second action by the same plaintiff is estopped from putting on record a plea which is inconsistent with any traversable allegation in the statement of claim in the former action. (*Halsbury's* Laws of England, 3rd Edition, Volume 15, page 186). He says that as the plea which has been raised in this case by the defendant could have been pleaded by the defendant in answer to the claim in Penang High Court Civil Suit No. 116 of 1962 but was not, he cannot put on record this plea in this case because it is inconsistent with a traversable allegation in the statement of claim in that civil suit.

As I have already said the judgment in that civil suit was obtained in default of defence and estoppel based on a default judgment must be very carefully limited. A defendant is only estopped from setting up in a subsequent action a defence which was necessarily and with complete precision decided by a previous judgment. (*New Brunswick Railway Company* v. *British and French Trust Corporation Ltd.* [3]). I do not think it can be said that because the defendant failed to file a defence in Penang High Court Civil Suit No. 116 of 1962 and judgment was given against him in default of defence the defendant's defence in this action was necessarily and with complete precision decided by the previous judgment. As Willes J. said in *Howlett* v. *Tarte* [4] "nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action".

The plaintiff's claim therefore fails and is dismissed.

By reason of faulty pleadings the defendant has rendered the task of everyone in reaching a conclusion in this suit much more difficult and much more prolonged than would have been the case had his pleadings been in order in the first place. Accordingly, except where orders in respect of certain matters in this action have already been made specifically ordering one party to pay the other party's costs, I order that both parties pay their own costs.

Claim dismissed.

Solicitors: *Jag-Jit Singh & Co.; Tan Lye Huat & Co.*

GOVERNMENT OF MALAYSIA & ANOR. v. CHIN KEOW

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) March 2, 1965]

[K.L. — Federal Court Civil Appeal No. 57 of 1964]

Negligence — Standard of reasonable care — Duty of medical practitioner — Powers of court on appeal.

This was an appeal against the decision of the High Court giving judgment for the respondent for damages against the Government of Malaysia and Dr. Devadason for negligence in giving a penicillin injection as a result of which one Chu Wai Lian had died ([1964] M.L.J. 322). The learned trial judge held that there was negligence on the part of the doctor, as he had failed to question the patient as to her sensitivity to penicillin.

Held: as the evidence showed that in the early part of 1960 when the injection was given the potential dangers for penicillin injections were not very widely appreciated by the medical profession in the country and it was not the generally accepted practice among doctors